



**WESTERN
PAYMENTS ALLIANCE**

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March 12, 2004

Ms Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, DC 20551

**Re: Regulation CC; Docket R-1176
Availability of Funds and Collection of Checks**

Dear Ms. Johnson:

The Western Payments Alliance' ("WesPay") appreciates the opportunity to comment on the Federal Reserve Board ("FRB") proposal to implement the provisions of the recently enacted *Check Clearing for the 21st Century Act* ("Check 21 Act") as amendments to Regulation CC. WesPay's comments focus on matters related to the Automated Clearing House ("ACH") Network, and to remotely-created drafts.

Substitute Check Warranties in Section 229.52(a)

Section 5(2) of the Check 21 Act creates a warranty against presenting both the original check and a "substitute check" to collect one underlying payment. FRB seeks comment on its proposed Section 229.52(a) implementing that provision in the Act as to whether the duplicate payment warranty should apply to "an ACH debit that was created using information from an original check or substitute check."

WesPay believes very strongly that the warranty in Section 229.52(a) should NOT apply to a duplicate payment resulting from an ACH debit. ACH entries lie fully outside laws specific to checks and check collection and are governed by a combination of the FRB's Regulation E and NACHA ACH Operating Rules ("the ACH Rules"). Moreover, the ACH Rules provide ample protection with respect to a duplicate payment involving an ACH debit entry related to a check. First, the ACH Rules already contain a comparable warranty with respect to the ACH debit entry that the original check, which would include a substitute check, will not be presented. Second, the ACH Rules require prompt recrediting of the Receiver's account if the "item" (i.e., the original check or its substitute) or source document is also presented for payment.²

¹ The Western Payments Alliance ("WesPay") is a not-for-profit financial trade association providing electronic fund transfer services to over 1,000 financial institutions and approximately 120 corporate members in California, Hawaii, Idaho, Nevada, Oregon, Utah and Guam. WesPay consults with its members on the application and interpretation of Automated Clearing House (ACH) Operating Rules, and provides a variety of workshops and seminars designed to increase our members' knowledge on ACH processes, enhance rule compliance, and mitigate risk.

² NACHA Rule 7.6.2 for POP, 7.6.3 for RCK and 7.6.4 for ARC entries.

Remotely-Created Demand Drafts (229.37 III(C))

FRB seeks comment on whether to incorporate into Regulation CC the latest NCCUSL amendments to UCC **3&4** relating to "remotely-created demand drafts" (also known as "demand drafts" or "pre-authorized drafts"). In summary, the amendments to UCC **3&4** would establish a new transfer and presentment warranty for remotely created demand drafts whereby the transferor warrants that "the person on whose account the item is drawn authorized the issuance of the item in the amount for which the item is drawn."

In **1996**, WesPay became aware of unauthorized demand drafts being used to commit fraud against consumers and business in its marketplace, specifically in California. To respond to that issue, WesPay adopted a local clearing house rule, effective February 1, **1996** for its check services participants that provides that:

A bank of first deposit (depository bank) endorsement by a Member on a MICR-encoded third-party draft shall be deemed to warrant that such item is not an unauthorized debit. An unauthorized debit, under WesPay Rules, means a draft that (1) does not contain the signature of a drawer, or (2) contains a notation indicating, in effect, that the account owner has authorized the debit or the printed or typewritten name of an account owner, or of a person purporting to be the agent of an account owner, as drawer, initiated (a) by a person not authorized by an account owner to initiate a debit, or (b) in an amount greater than an amount authorized by an account owner.³

A WesPay member participating in check clearing services that obtains a signed "Affidavit of Unauthorized Debit Activity" form from its account holder claiming an unauthorized debit may return the item as an adjustment entry within sixty-five (**65**) days of settlement for the debit.

Subsequent to WesPay's **1996** rule amendment, the California State Legislature adopted a revision to the California Commercial Code providing a similar right of adjustment for unauthorized demand drafts. Idaho and Utah have since adopted similar UCC revisions.

WesPay strongly supports adding an authorization warranty for demand drafts to Regulation CC since this would clarify where the responsibility for obtaining proper authorization lies and which party(ies) would be accountable in the event of a disputed authorization. By adopting such a warranty under Regulation CC the warranty would apply uniformly across the Nation's check collection mechanism. Further, WesPay concurs with NACHA's position, as expressed to the Board in its response to this docket, that there is no basis for distinguishing between consumer and non-consumer accounts in this regard.

WesPay appreciates the opportunity to comment on this proposal. If you have any questions regarding our comments, please call me at **415-373-1185**.

Sincerely,


Peter Yeatrakas
President & CEO

cc: WesPay Board of Directors

³ Western Payments Alliance Rules, Part **4**: Check Clearing Services, **4.8.1** Warranties.